school in relation to their land by some sort of sub-division of such part of their land as they are prepared to set aside for the purposes of the school and have it vested in themselves as trustees for that purpose or vest it in some other persons as trustees after consultation with the Attorney-General.

Action dismissed.

Solicitors: *Dato' S. M. Yong & Co.; R. R. Chelliah Bros.*

STEPHEN KALONG NINGKAN v. TUN ABANG HAJI OPENG & TAWI SLI (No. 2)

[O.C.J. (Pike C.J. (Borneo)) December 2, 1966]

[Kuching — Civil Suit No. K. 88 of 1966]

Constitutional Law — Proclamation by Yang di-Pertuan Agong under Federal Constitution art. 150 — Allegation that it was not made bona fide but in fraudem legis — Whether matter beyond jurisdiction of court — Allegation that Act of Parliament is null and void and ultra vires — Constitution of Malaysia arts. 4, 32, 40, 128, 150 and 161.

Constitutional Law — Immunity of the Yang di-Pertuan Agong — Whether acts of the Federal-Government in the name of the Yang di-Pertuan Agong and acts of the Yang di-Pertuan Agong on the advice of the Federal Cabinet protected — Constitution of Malaysia, art. 32(1).

Legislation — Act of Parliament — Allegation that Act is null and void and ultra vires — Act of Parliament can only be questioned in action for declaration that law is invalid — Necessity to obtain leave of judge of Federal Court.

In this case the plaintiff had claimed —

(a) a declaration that the calling, meeting and vote of the Council Negri on September 23, 1966, was illegal, null, void and of no effect;

(b) a declaration that his purported dismissal by the first defendant was *ultra vires*, null and void;

(c) a declaration that the purported appointment of the second defendant as Chief Minister was illegal, null, void and of no effect;

(d) a declaration that the plaintiff is and was at all material times from July 22, 1963, the Chief Minister of Sarawak.

In the plaintiff's statement of claim he claimed (a) that the proclamation of a state of emergency made by the Yang di-Pertuan Agong on the advice of the Federal Cabinet on September 14, 1966 was null, void and of no effect by reason of the fact that it was not made *bona fide* but was made in *fraudem legis* (b) that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 of the Parliament of Malaysia was null, void and of no effect. The defendants applied for the writ and pleadings to be struck out because they involved matters beyond the jurisdiction of the court.

Held: (1) article 32(1) of the Constitution of Malaysia only protects the Yang di-Pertuan Agong personally from proceedings in a court but cannot be construed to protect the Federal Government from action in the courts in respect of its acts committed in the name of the Yang di-Pertuan Agong and when the Yang di-Pertuan Agong acts on the advice of the Federal Cabinet his act must be deemed to be the act of the Federal Government;

(2) since the *bona fides* of the making of the proclamation of emergency in this case was challenged there was a cause of action within the jurisdiction of the court and without hearing evidence it would not be possible to say whether it will succeed or fail; the court would be usurping the functions of the trial judge if it acceded to the request to strike out the writ and statement of claim on his point;

(3) the plaintiff could not in an action against the defendants ask the High Court to make a declaration that a Federal law is invalid on the ground mentioned in article 4 of the Constitution;

(4) the leave of a judge of the Federal Court must be obtained before proceedings for a declaration of the invalidity of a Federal law can be brought in the High Court and as this was not done in this case the writ of summons and the statement of claim, in so far as they alleged the invalidity of the Act of the Federal Parliament must be struck out.

Cases referred to:—

(1) *Goodson* v. *Grierson* [1908] 1 K.B. 761.

(2) *Charles Forte Investment Ltd.* v. *Amanda* [1963] 3 W.L.R. 662.

(3) *Bhagat Singh & others* v. *The King Emperor* (1931), L.R. 58 I.A. 169.

(4) *The King Emperor* v. *Benoari Lal Sharma* [1945] A.C. 14.

(5) *Regina* v. *Governor of Brixton Prison* [1962] 2 Q.B. 243.

(6) *Liversidge* v. *Anderson* [1942] A.C. 206.

(7) *Wenlock* v. *Moloney* [1965] 1 W.L.R. 1238.

(8) *Bull* v. *Attorney-General for New South Wales* [1916] A.C. 564.

(9) *East Midlands Gas Board* v. *Doncaster Corporation* [1953] 1 All E.R. 54.

APPLICATION TO STRIKE OUT WRIT OF SUMMONS AND STATEMENT OF CLAIM IN CHAMBERS.

Tan Chiaw Thong (Attorney-General) as *amicus curiae.*

T. O. Thomas for the plaintiff.

George Seah for the defendants.

Cur. Adv. Vult.

Pike C.J. (Borneo): The defendants in the above suit make application, through their advocate Mr. George Seah, to strike out the writ of summons and statement of claim herein on the ground that they involve matters beyond the jurisdiction of this court.

The plaintiff who, until dismissed on the 24th day of September, 1966, by the first defendant in his capacity as Governor of Sarawak, was the Chief Minister of Sarawak, claims the declarations set out hereunder and seeks an injunction to restrain the second defendant from acting as Chief Minister of Sarawak.

1. A declaration that the calling, meeting and vote of Council Negri on the 23rd day of September 1966 were illegal, null, void and of no effect.

2. A declaration that his purported dismissal by the first defendant was *ultra vires,* null and void.
3. A declaration that the purported appointment of the second defendant as Chief Minister was illegal, null, void and of no effect.
4. A declaration that the plaintiff is and was at all material times from the 22nd day of July 1963 the Chief Minister of the State of Sarawak.
5. An injunction restraining the second defendant from acting as the Chief Minister of the State of Sarawak.

The plaintiff's statement of claim sets out the grounds on which he claims these declarations. In paragraphs 2 to 15 he claims that the Proclamation of a State of Emergency made by the Yang di-Pertuan Agong on the advice of the Federal Cabinet on the 14th September, 1966, is null, void and of no effect by reason of the fact that it was not made *bona fide* but was made in *fraudem legis* and he pleads certain particulars in support of this claim. In paragraphs 16 to 22 he claims that an Act of the Parliament of Malaysia entitled the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, was *ultra vires* the said Parliament null, void and of no effect. In paragraph 18 the claim that it is null and void is made on the ground that it purported to be made by virtue of the Proclamation of Emergency which by the earlier referred to paragraphs of the statement of claim the plaintiff says is void because the making of it was in *fraudem legis* but in the other paragraphs above referred to the *vires* of that Act is questioned independently of the validity of the Proclamation.

The burden upon an applicant who asks that a writ of summons and statement of claim be struck out is a heavy one. He must be able to show that the action must fail or that for some other reason it is an abuse of the process of the court or is frivolous or vexatious. See *Goodson* v. *Grierson.*[1] This case has stood the test of time and was expressly approved in *Charles Forte Investments Ltd.* v. *Amanda.*[2] Lord Justice Willmer at page 666 says:

> "As to the circumstances in which the inherent jurisdiction of the court may be invoked, I entirely accept the judge's caution, which he quoted from the *Annual Practice,* 1963, p. 577, that this is a jurisdiction to be exercised with great circumspection. Mr. Instone this morning has properly drawn our attention to an authority, *Goodson* v. *Grierson,* which expresses the test to be applied as being whether it is impossible for the party concerned to succeed on his claim".

The application is supported by an affidavit sworn by Mr. George Seah, advocate for the defendants, and is resisted by an affidavit sworn by the plaintiff.

The defendants, through their counsel, say that the writ and pleadings should be struck out because they involve matters beyond the jurisdiction of this court. The grounds on which this contention is based must be separately considered in relation to paragraphs 2 - 15 and 16 - 22 of the statement of claim. They are separately dealt with in paragraphs 5 and 6 of Mr. Seah's affidavit.

In respect of the making of the Proclamation by the Yang di-Pertuan Agong under article 150 of the Federal Constitution the defendants say that it purported to be made by virtue of the that acts of the Yang di-Pertuan Agong under this article cannot be questioned in any court. Counsel for the defendants submitted that the power conferred by article 150 is not a power delegated by Parliament but a power vested by the Constitution in the Yang di-Pertuan Agong and that as such it is not open to question in any court. But since the federation of Malaysia is the creation of a Statute, namely the Constitution of Malaysia, and that Statute was enacted by Parliament and is by article 161 defined as "written law", it is difficult to see any merit in this argument. The fact that by clauses (2) to (6A) of article 150 Parliament imposes controls of one sort or another upon the exercise of the power seems clearly to be against his contention. Furthermore since under article 40 of the Constitution the Yang di-Pertuan Agong is required to act upon the advice of the cabinet in making a proclamation under article 150 (and indeed in all other matters except those mentioned in clauses (2) and (3) of article 40), it cannot, I think, be argued that the power conferred by article 150 is a prerogative power analogous to certain powers of the British Sovereign. Counsel also argued that since the power was vested in the Yang di-Pertuan Agong and since by article 32(1) the Yang di-Pertuan Agong is not liable to any proceedings whatsoever in any court the act of the Yang di-Pertuan Agong is not challengeable in any court. Article 32(1) only protects the Yang di-Pertuan Agong personally from proceedings in a court but cannot be construed to protect the Federal Government from action in the courts in respect of its acts committed in the name of the Yang di-Pertuan Agong, and when the Yang di-Pertuan Agong acts on the advice of the cabinet his act must be deemed to be the act of the Federal Government.

This, however, does not conclude the matter. The next question which arises is whether, assuming it to be the act of the Federal Government, the exercise of it can ever be questioned in a court. It seems clear from the cases that it is not open to a court to enquire into the sufficiency of the reasons for a declaration of emergency provided it was made *bona fide.* If, therefore, the declaration appears *ex facie* to have been made in the manner required by the

statute and the *bona fides* of the making of the declaration is not impugned, it is not open to the court to enquire into it. I refer to the case of *Bhagat Singh and others* v. *The King Emperor.*[3] On the face of it this case seems to go further than the opinion expressed above but the *bona fides* of the Governor General was not questioned and it does not appear from the report that the question was considered. In *The King Emperor* v. *Benoari Lal Sharma* [4] while the Board expressly approved the decision in *Bhagat Singh* v. *The King Emperor,* Viscount Simon L.C. in delivering the judgment of the Board made it clear that the exclusion of the court's right to enquire into the exercise of such a power depends upon whether or not the act was done *bona fide.* At page 21 the Lord Chancellor says:

"It is to be observed that the section does not require the Governor General to state that there is an emergency, or what the emergency is, either in the text of the Ordinance or at all, *and assuming he acts bona fide and in accordance with his statutory powers,* it cannot rest with the courts to challenge his view that the emergency exists. In the present instance such questions are immaterial, for at the date of the Ordinance (January 2, 1942) no one could suggest that the situation in India did not constitute an emergency of the most anxious kind".

If further authority be needed for the proposition that courts have power to go behind apparently lawful orders it will be found in *Regina* v. *Governor of Brixton Prison* [5] and in *Liversidge* v. *Anderson.*[6]

In the former case Lord Denning said at page 302:

"It is open to these courts to enquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of the power or not? The courts can always go behind the face of the deportation order to see whether the powers entrusted by Parliament have been exercised lawfully or not".

In the *Liversidge* case Viscount Maugham at page 224 says:

"The result is that there is no preliminary question of fact which can be submitted to the courts and that in effect there is no appeal from the decision of the Secretary of State in these matters (orders of detention under regulation 18B of the Defence (General) Regulations, 1939) *provided only that he acts in good faith".*

And Lord Atkin at page 233 says:

"In all these cases it is plain that unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good faith".

If the writ of summons and pleadings show on their face a cause of action the fact that the plaintiff may be faced with grave difficulties of proof is not, as I understand the authorities, any ground for striking out the writ. Nor would the fact that parties other than those sued ought to have been joined justify this course.

In my opinion the plaintiff's writ and the matters contained in paragraphs 2 - 15 of his statement of claim do disclose a cause of action within the jurisdiction of this court, and, without hearing evidence, it is not possible in my view to say whether it will succeed or fail. It may indeed be necessary at some stage of the proceedings for certain matters which may arise to be referred for the decision of the Federal Court under section 48 of the Courts of Judicature Act, 1964, but this does not imply that this court has no jurisdiction to enquire into the acts of the defendants which were performed within its jurisdiction.

I have come to the conclusion therefore that I would be usurping the functions of the trial judge if I acceded to the defendants' application to strike out the writ and statement of claim. The case of *Wenlock* v. *Moloney* [7] seems to me to support this view.

This however does not conclude the matter because the defendants also contend that paragraphs 18, 19, 20, 21, 22, 23, 25 and 26 of the plaintiff's statement of claim (in which the plaintiff alleges that the Act of Parliament entitled the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, is null and void and *ultra vires* the Federal Parliament) question the validity of an Act of Parliament and by reason of the provisions of article 128 of the Federal Constitution it is beyond the jurisdiction of this court and is within the exclusive jurisdiction of the Federal Court and that by reason of the provisions of article 4 of the Federal Constitution such a proceeding can only be commenced with the leave of a judge of the Federal Court.

I set out below the texts of articles 4 and 128 of the Federal Constitution —

"4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(2) The validity of any law shall not be questioned on the ground that —

(a) it imposes restrictions on the right mentioned in article 9(2) but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in clause (3) (not being proceedings falling within paragraph (a) or (b) of the clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party

to proceedings brought for the same purpose under paragraph (a) or (b) of the clause".

"128. (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine —

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) disputes on any other question between States or between the Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

(3) The jurisdiction of the Federal Court to determine appeals from a High Court or a judge thereof shall be such as may be provided by federal law".

Firstly, it seems clear that the intention of clause (3) of article 4 is to ensure that an Act of Parliament shall only be challengable on the ground that it makes provision in respect of a matter in respect to which Parliament has no power to make a law. Secondly, it seems equally clear that the intention of Parliament was that unless such a law was being questioned in proceedings between the Federation and a State the only method by which it is permissible to question it is by an action for a declaration that the law is invalid on the ground above stated. Thirdly, clause (4) of article 4 forbids the commencement of an action for such a declaration without the leave of a judge of the Federal Court.

Turning now to those paragraphs of the statement of claim which the defendants contend question the validity of the Act of Parliament, what do we find? I set out below the paragraphs referred to:

18. The said Act was *ultra vires* the said Parliament, null, void and of no effect in that it purported to be passed by virtue of the said Proclamation of Emergency which was null, void and of no effect.

19. Alternatively, and in addition, clause 3 of the said Act was *ultra vires* the said Parliament, null, void and of no effect in that it purported to amend the Constitution of Malaysia contrary to section 161E(2) of the said Constitution.

20. Alternatively, and in addition, clause 3 of the said Act was *ultra vires* the said Parliament, null, void and of no effect in that it purported to amend the Constitution of the State of Sarawak in a manner contrary to the said Constitution and was therefore *ultra vires* section 150 of the said Constitution.

21. Alternatively, and in addition, clauses 4 and 5 of the said Act were *ultra vires* the said Parliament, null, void and of no effect in that they are *ultra vires* section 150 of the said Constitution as amended by clause 3 of the said Act or as unamended because they purport to amend the Constitution of the State of Sarawak in a manner contrary to the said Constitution.

22. Alternatively, and in addition, clauses 4 and 5 of the said Act were *ultra vires* the said Parliament, null, void and of no effect in that they purport to amend the Constitution of the State of Sarawak in a manner contrary to the said Constitution and contrary to the international agreement known as the Agreement Relating to Malaysia solemnly entered into between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore.

23. On the 20th day of September 1966 the first defendant, the Governor of Sarawak, purporting to act under the said Act and not acting on the advice of the plaintiff the Chief Minister of Sarawak as required by the Constitution of Sarawak called a meeting of the Council Negri of Sarawak.

25. On the 24th day of September 1966 the first defendant purporting to act under powers conferred by the said Act and contrary to the Constitution of Sarawak purported to dismiss the plaintiff from his position as Chief Minister of the State of Sarawak and purported to appoint the second defendant Chief Minister in the plaintiff's place.

In my opinion paragraphs 18, 19, 20, 21 and 22 quite clearly do question an Act of Parliament on the ground that it makes provision in respect of a matter in respect of which Parliament has no power to make a law.

The plaintiff's answer to this is that if they do they only do so incidentally. What they really question is a provision of the Constitution though he conceded that this did not apply in the case of paragraph 22 and he would not, if the court saw fit, contest the striking out of that paragraph.

In my opinion article 4(3) and (4) of the Federal Constitution was designed to prevent the possibility of the validity of laws made by Parliament being questioned on the ground mentioned in article 4, incidentally. It was for this very reason that the article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. In other words, the subject must ask for a specific declaration of invalidity and may not, in my opinion, by seeking declarations of another, albeit perfectly proper, nature question the validity of such a law. In order further to secure that frivolous or vexatious proceedings for such declarations are not commenced, article 4(4) requires that the leave of a judge of the Federal Court must be obtained before the proceedings are commenced. Where a statute prescribes a particular mode of procedure that mode of procedure must be followed. See *Bull* v. *Attorney-General for New South Wales* [8] and *East Midlands Gas Board* v. *Doncaster Corporation.* [9]

Clearly the plaintiff could not in an action against these defendants ask this court or indeed any court to make a declaration that the law is invalid on the ground mentioned in article 4 of the Federal Constitution. An application to a Federal Court judge for leave to do so would be doomed to failure, in whatever court he sought to commence the proceedings. Any such action would clearly need to be brought against the

Federal Government and not against the Governor of a State and the Chief Minister (*de facto* or *de jure*) of that State.

If the plaintiff failed in his attempt to shew that the making of the Proclamation under article 150 of the Constitution was not done *bona fide* but was in *fraudem legis* then even if paragraphs 18, 19, 20, 21 and 22 of his statement of claim remained as part of his pleadings I am of opinion that this court would be precluded from relying on the grounds therein stated to make any of the declarations which the plaintiff seeks in this action. In these circumstances I am of opinion that paragraphs 18, 19, 20, 21 and 22 of the statement of claim should be struck out on the ground that they seek to question the validity of a law made by Parliament in a manner other than that provided by Parliament in article 4(3) of the Constitution and in a court other than that to which exclusive jurisdiction has been given by article 128 of the Constitution.

I am conscious that in making this order I may be condemning the plaintiff to the institution of two actions in different courts. I have carefully considered this undesirable result but since the requirements as to the form of proceedings by which the validity of an Act may be questioned, the court in which jurisdiction to entertain such proceedings is vested, and the need for the leave of a judge of that court for the commencement of any such proceedings are part of the Constitution, they are to be regarded as conditions precedent and not as mere procedural requirements. They are mandatory and not merely directory provisions.

For the reasons set out above I decline to make the order in terms of the summons but I order that the plaintiff's statement of claim be amended by striking out paragraphs 18, 19, 20, 21 and 22 and I further order that the costs of this application be costs in the cause.

Order accordingly.

RE AW BOON HAW DECD.

[O.C.J. (Choor Singh J.) December 6, 1966]

[Singapore — Originating Petition Nos. 11, 12 and 13 of 1966]

Estate Duty — Assessment of estate duty — Application to court to determine estate duty — Whether court has power to allow appeal without "security being given to satisfaction of the court" — Amount of security — Estate Duty Ordinance (Cap. 162), s. 44.

The executrix of the will of Aw Boon Haw, deceased, was aggrieved by the notice of assessment of estate duty on the estate and applied to the court under section 44(1) of the Estate Duty Ordinance to determine the estate duty. The amount of estate duty claimed by the commissioner was $1,669,000 and the petitioner had paid $600,000. She applied (a) that no further estate duty or interest be paid by her and no further security be furnished to the commissioner pending the determination by the court of the estate duty (b) that if security is required, the court could allow the petitioner to give security for such sum as the court thinks fit.

Held: (1) the court has no power to allow an application to be brought under section 44(1) of the Estate Duty Ordinance without security being given to the satisfaction of the court;

(2) while the court has a discretion as to the mode in which the security is to be given, it has no discretion as to the amount of the security and such security must be given for the whole or any part of the estate duty which remains unpaid.

ORIGINATING PETITION.

R. K. Booker for the applicant.

Amarjit Singh Verick for the Commissioner of Estate Duties.

Cur. Adv. Vult.

Choor Singh J.: These proceedings arise out of a dispute between the Commissioner of Estate Duties and the executrices of the will of a deceased person concerning the amount of the estate duty payable in respect of the assets of the deceased in Singapore and raise a question as to the true interpretation of the provisions of section 44 of the Estate Duty Ordinance.

The petitioner is one of the executrices of the will of the late Aw Boon Haw who died on the 4th September, 1954. The Commissioner of Estate Duties issued a notice of assessment in respect of the assets of the deceased's estate in Singapore, valued by him at $4,890,239.30, claiming estate duty thereon at the rate of 37 per cent. The petitioner is aggrieved by the notice of assessment and has made an application to this court under section 44(1) of the Estate Duty Ordinance for the determination by this court of the amount of estate duty payable on the death of the deceased in respect of his assets in Singapore. Section 44(1) reads as follows:—

"An executor . . . . aggrieved by any claim by a notice of assessment by the commissioner for payment of estate duty or interest thereon, ... may, on payment of, or giving security as hereinafter mentioned for, the amount claimed by the commissioner or such portion of it as is then payable by him, apply to the High Court within three months from the date of the . . . . claim and the amount of the duty and interest shall be determined by the High Court, and if the duty and interest as determined is less than that paid to the commissioner the excess shall be repaid".

It will be seen that an aggrieved person's application under section 44(1) of the Ordinance calls for the determination by the court of the correct amount of the estate duty payable. And it would appear that such an application can only be made "on payment of or giving security as hereinafter mentioned for the amount claimed by the commissioner". Section 44(4) of the Ordinance provides as follows:—

"The High Court, if satisfied that it would impose hardship to require the applicant, as a condition of the application, to pay the whole, or as the case may be, any